

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DANNY SILLS)	
Claimant)	
V.)	
)	Docket No. 1,075,032
MARS PETCARE US)	
Respondent)	
AND)	
)	
LIBERTY INSURANCE CORP.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requests review of the June 14, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

John L. Carmichael, of Wichita, Kansas, appeared for the claimant. Daniel J. Lobdell, of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from June 10, 2016, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant's injury to be work-related and ordered respondent to pay temporary total disability at \$587 per week between February 24, 2014, and September 22, 2014, not to exceed a total of 43 days of benefits.¹ Respondent was ordered to provide the names of two qualified physicians in the general proximity of Norman/Oklahoma City,

¹ The record is not clear whether the date of accident is February 12 or February 24, 2014. The ALJ utilized February 24 as the start date for the TTD. The Board will use that date as the date of accident for preliminary hearing purposes.

Oklahoma from which claimant will designate an authorized treating physician. Respondent was also ordered to pay medical expenses incurred, as itemized in Claimant's Exhibit 2, with the amounts limited to out-of-pocket costs from claimant and/or his attorney as well as reimbursement to claimant for any co-pay or deductible costs not covered by claimant's health insurance.

Respondent appeals, arguing the overwhelming weight of the credible medical evidence establishes claimant did not sustain a compensable injury to his back and treatment for that body part is unwarranted and should be specifically denied. Respondent contends treatment should be limited to the left hip. Respondent also argues none of the bills submitted by claimant were submitted in HCFA 1500 format (a form specified under the medical fee schedule) or its equivalent. Therefore, they are void and unenforceable.

Claimant contends the ALJ's Order should be affirmed.

The issues on appeal are:

1. Did claimant sustain a compensable injury to his back, warranting authorized medical treatment?
2. Is respondent responsible for the payment of medical bills submitted in an inappropriate format?
3. Does the ALJ's Order articulate the medical bills to be paid with sufficient specificity?

FINDINGS OF FACT

Claimant worked for respondent for approximately eight years as a machinist. He testified that for ten years he had problems with his back. He was told the pain was due to a lifetime of abuse to his back. When the pain became unbearable he went to the Laser Spine Institute and had surgery on November 7, 2013, consisting of an L5-S1 laminotomy, foraminotomy and partial facetectomy. After surgery, he was up walking without pain for the first time. Claimant was off work for 90 days. He had a successful outcome from surgery and had no problems or complaints in his back or any other part of his body. Before surgery claimant's pain started in the middle of his back and went down into his knees and sometimes his feet.

Claimant returned to work in February 2014, with no restrictions. A few weeks after returning to work, claimant was running an engine lathe and the wrench he was using slipped and claimant fell backwards. Claimant tried to catch himself, but hit the concrete landing on his buttocks and hitting his head on a metal cabinet. As a result, claimant suffered injury to his left lower back, with pain down into his buttocks on the left side. He had a concussion and several abrasions. Claimant indicated the pain in his low back was

in a different location from where it had been for ten years before. Claimant testified it was in the middle of his back at the waistline and went down the outside of his buttocks, into his leg, down to his knee and sometimes into his foot. He indicated the pain was sometimes like a pins and needles sensation, but mostly sharp and acute in the center of his buttocks and into his low back. Claimant's pain, before surgery, was on the outside of his buttocks.

Claimant immediately reported his accident to his supervisor, Jeff Lassiter, and an accident report was filled out. Claimant discussed medical care with Mr. Lassiter and spoke with Chris Thomas, the safety person. The three decided to wait a couple of days to see if claimant was just sore from the fall. About a week later, the pain was still present and claimant was told he should get x-rays. X-rays showed nothing and claimant was encouraged to get an MRI with contrast to rule out any damage to his back. When respondent refused to pay for the MRI, claimant started working with the company nurse to gather information necessary to get the workers compensation insurance company to reconsider. Despite everything claimant submitted, the insurance company still declined to pay any of his medical bills. Claimant received letters indicating his accident was not considered compensable and that his condition was considered preexisting.

Claimant sought medical attention with his family physician, Kimberly Wood, M.D. Claimant reported low back pain after a fall. Dr. Wood sent claimant to a pain specialist, and it was determined a SI injection would be the appropriate treatment for claimant's pain. Claimant received an injection, which provided him no relief from the pain. Claimant indicated Dr. Wood assigned a 6 pound work restriction. Claimant's work restriction was changed to 15 pounds after respondent informed him they would not accommodate the 6 pound restriction. Claimant worked for a while at 15 pounds and then respondent asked that his restrictions be changed again. He got the restrictions increased to 35 pounds and worked for a while before being told he needed his restrictions removed. Claimant called Dr. Wood and asked for the restrictions to be lifted and she said no, indicating they never should have been raised. Claimant let his supervisor know every time he went to the doctor and that he was incurring medical bills for treatment of his work injury. Claimant was instructed to submit bills to his health insurance. Claimant indicated that every medical bill he has submitted for payment or reimbursement was for the work injury.

Claimant met with Derek W. Miller, D.O., an orthopedist, on October 7, 2014. Claimant presented with left hip pain and buttocks pain, radiating into his leg, which was moderate to extreme. Dr. Miller diagnosed left sacroiliitis and recommend SI joint injections with Dr. Giedd and sent claimant for physical therapy. Claimant testified therapy caused him to have more pain and he stopped going. Claimant then went for acupuncture treatment, which provided short-term relief. Claimant stopped treatment when he could no longer afford it.

Dr. Wood also sent claimant to Joseph M. Graham, Jr., D.O., an orthopedist. On March 10, 2015, claimant met with Dr. Graham, presenting with left side low back pain and

left hip pain resulting from a fall at work. Dr. Graham diagnosed sacroiliitis. An MRI was ordered, and an injection was recommended, but both were declined. Claimant was allowed to work with no restrictions. Dr. Graham, after reviewing the MRI, diagnosed claimant with bilateral L4-5 marginal foraminal stenosis and sacroiliitis.

Claimant's attorney sent him to George G. Flutter, M.D., for an examination on October 21, 2015. Claimant reported low back pain into his left buttock and leg. He described the pain as sharp, aching and shooting and constant. Dr. Flutter examined claimant and opined there was a connection between claimant's condition and the work injury. Dr. Flutter noted the most pronounced findings were at L4-5 with moderate to severe spinal canal narrowing and moderate bilateral neural foraminal narrowing.

Dr. Flutter wrote that, although claimant has a history of back pain for which he underwent lumbar spine surgery in November 2013, claimant reported that he was pain-free until the February 2014 injury, which, the doctor opined represents a new injury, not an aggravation/acceleration of a preexisting condition.

Dr. Flutter found the work-related injury was the prevailing factor for claimant's need for medical evaluation/treatment. He assigned temporary restrictions and recommended medication and additional testing.

Claimant is no longer working for respondent because it became a hostile work environment. Claimant testified respondent was upset that he had missed so much work. Claimant's last day with respondent was May 10, 2015. Claimant was off work until November 2015, at which time he was hired as a machinist for Tinker Air Force Base, Department of Defense. Claimant continues to work for Tinker. Claimant testified he is in constant pain and starts the day at five or six out of a pain scale of one to ten and by noon his is at a nine or ten. He takes Tylenol and muscle relaxers. Claimant indicated he is willing to have more SI injections if authorized.

Claimant was sent to Peter V. Bieri, M.D., for a court-ordered independent medical examination (IME) on February 15, 2016. Claimant primarily complained of left hip pain. He acknowledged his previous low back surgery and that his current pain is more lateral and localized to the hip. Dr. Bieri noted claimant had gait derangement and pain with all weight-bearing and ambulation. Dr. Bieri opined claimant incurred injury during the course of his employment which involved the left hip and low back. He noted claimant's prior unrelated back surgery and diagnostic interventions at L5-S1, revealed no significant change. His diagnosis was consistent with left SI joint pain.

Dr. Bieri opined the examination failed to support any true injury to the lumbar spine region or any true aggravation of the unrelated previous surgical intervention. He determined the injury was the prevailing factor for the diagnosis rendered, treatment given and residual permanent impairment. Dr. Bieri found claimant to be at maximum medical

improvement and assigned a three percent whole person impairment. He opined it was at claimant's discretion should he want to pursue injection therapy to the left SI joint.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f)(1)(2)(B)(3)(A) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

- (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

This record identifies a specific, traumatic accident which led immediately to new symptoms in claimant's low back, left hip and left lower extremity. The fact claimant had suffered a non work-related injury to his back and had undergone surgery only a few months before this accident, while somewhat concerning to this Board Member, is not determinative in this instance. It is significant that the surgery was at L5-S1 and the current diagnosis appears more at the L4-5 level.

This Board Member finds claimant's accident on February 24, 2014, was a new and separate accident. Additionally, while the symptoms appear to be more in the hip rather than the back, there is enough low back component in this instance to justify treatment in that area as well. The determination by the ALJ is affirmed.

K.S.A. 2013 Supp. 44-534a(a)(2) states:

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing.

The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

(b) If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a, and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it alleged the administrative law judge exceeded his or her jurisdiction and the issues delineated in the above statute. The issues dealing with the forms used to present requested medical payments and the specificity of those medical bills are not issues over which the Board takes jurisdiction from a preliminary hearing appeal.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has proven that he suffered a compensable injury to his low back, left hip and left lower extremity as the result of the fall on February 24, 2014. The Order granting payment of medical expenses,

² K.S.A. 2015 Supp. 44-534a.

reimbursement for previously paid medical expenses as noted in the Order and ongoing medical treatment remains in full force and effect.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven M. Roth dated June 14, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Steven M. Roth, Administrative Law Judge